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No. 95-468

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

NATIONAL ENQUIRER, INC., *et al.*,
Petitioners,

v.

TAMARA HOOD, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal Second Appellate District

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REPLY TO BRIEF IN OPPOSITION

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1. The brief in opposition argues:

> "The Court of Appeal's decision does not restrict any breathing space; it merely holds that the question of its extent is for the jury to decide."

Br. Opp. 8. That is exactly the point: the scope of the First Amendment cannot be made to depend on the decisions of particular juries.

2. Respondents suggest that "[a]ny other view is tantamount to abdicating to the editors of the *National Enquirer* on the question of what is newsworthy." Br. Opp. 5. Would that be so strange? Normally in this country

it is editors, not juries, who decide what is news.[1] Moreover, if truthful publication may be restricted at all, that must be only when "overwhelmingly necessary," with judges applying laws "narrowly tailored to a state interest of the highest order." *Florida Star* v. *B.J.F.*, 491 U.S. 524, 537, 541 (1989). California's laws, by empowering juries to use "social value" or "feasible and effective alternatives" to determine the right to publish, do not satisfy that First Amendment standard.

3. Respondents assert that "the precise standards to be applied by a jury have not yet been determined by the California court." Br. Opp. 7. That statement is plainly incorrect. The standards are set forth explicitly in the Court of Appeal's opinion; following California precedents, it ruled exactly what the jury was to decide. Pet. Cert. App. 9a, 13a ("social value"), 27a (whether facts were "unnecessary"). Indeed, the prescribed model California jury instruction reads: "In determining whether the fact made known was newsworthy, you should consider, (1) the social value of the fact published . . . ." COMMITTEE ON STANDARD JURY INSTRUCTIONS, SUPERIOR COURT OF LOS ANGELES COUNTY, CALIFORNIA JURY INSTRUCTIONS: CIVIL § 7.21, at 310 (1994).[3]

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[1] "The First Amendment protects the editorial independence of the press." *Turner Broadcasting System, Inc.* v. *FCC*, 114 S. Ct. 2445, 2464 (1994). "[W]e . . . remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press." *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 560-61 (1976), quoting *Miami Herald Pub. Co.* v. *Tornillo*, 418 U.S. 241, 259 (1974) (White, J., concurring).

[2] Respondents elsewhere concede that the court held that "the social value of the facts published" is part of the jury's "newsworthiness" determination under California law. Br. Opp. 6, quoting Pet. Cert. App. 9a.

[3] Respondents excuse this as merely "one of the factors that may be used." Br. Opp. 6. But of course juries may not be allowed to consider improper factors, even if they are also instructed on proper ones. *E.g.*, *Regan* v. *Time, Inc.*, 468 U.S. 641, 648-49 (1984).

4. Respondents characterize the Court of Appeal's opinion as an "interim" decision. Br. Opp. 4, 9. There is nothing interim about it. "Although there has not yet been a trial on the merits in this case, the judgment of the California appellate court is 'plainly final on the federal issue and is not subject to further review in the state courts.' " *Calder* v. *Jones*, 465 U.S. 783, 788 n.8 (1984), quoting in part *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 485 (1975); see also *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 179-80 (1988); *Miami Herald Pub. Co.* v. *Tornillo*, 418 U.S. 241, 247 n.6 (1974).

5. Respondents imply that the Court of Appeal's ruling was based on the *Enquirer*'s having published the fact of the illegitimate birth. But what the Court of Appeal held was that the publisher could be held liable, in spite of the First Amendment, simply for publishing the exact amounts that Mr. Murphy had paid for support of the child and mother. See Pet. Cert. App. 13a.[4] What respondents allude to as "intimate private facts," Br. Opp. 8, were simply dollar amounts. If this marginal disclosure was not protected by the First Amendment, then under laws like California's much of the press in the United States could be held liable on practically a daily basis. *Cf.* Pet. Cert. 21 n.16.

6. Without any explanation, respondents simply assert that there is no conflict with the decisions of federal courts of appeals and state supreme courts discussed in the petition. Br. Opp. 9. The conflict is stark. See, *e.g.*, *Cinel* v. *Connick*, 15 F.3d 1338 (5th Cir.), *cert. denied*, 115

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[4] "[W]e cannot say as a matter of law that the details of a celebrity's financial support of his child and Ms. Hood's are newsworthy. While the fact of that support may be newsworthy, the financial details may not. A trier of fact could conclude that how much money Mr. Murphy gave plaintiffs, the price of their home, the amount of Ms. Hood's monthly support, and the size of Christian's trust fund, were private facts, the publication of which was unnecessary to the story told and not newsworthy." Pet. Cert. App. 13a.

S. Ct. 189 (1994); *Haynes* v. *Alfred A. Knopf, Inc.*, 8 F.3d 1222 (7th Cir. 1993); *Star-Telegram, Inc.* v. *Doe*, 1995 WL 341575 (Tex. 1995); Pet. Cert. 18-20.

7. Respondents observe that

> "This Court has not held that states may not allow juries, with proper instructions, to balance an individual's right to the privacy of his or her financial or other intimate financial information against the public's right to information delivered through the press."

Br. Opp. 6. True, this Court has not had occasion so to rule in the precise context of a state privacy statute. But this Court has unequivocally held that "[t]he inquiry into the protected status of speech is one of law, not fact." *Connick* v. *Myers*, 461 U.S. 138, 148 n.7 (1983). This Court has held that the First Amendment does not allow the right to publish to turn upon standards with "inherent subjectiveness" that "would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46, 55 (1988). This Court has rejected under the First Amendment a standard of liability that "would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it." *Time, Inc.* v. *Hill*, 385 U.S. 374, 389 (1967).[5] This Court has held that a standard giving juries discretion over speech "holds a real danger of becoming an instrument for . . . suppression." *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 277 (1971). It is precisely because this Court has not yet applied those principles to this particular context that

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[5] See also *Regan* v. *Time, Inc., supra*, 468 U.S. at 648-49:

> "A determination concerning the newsworthiness or educational value of a photograph cannot help but be based on the content of the photograph and the message it delivers. . . . Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment."

California's anomalous privacy laws remain today to burden the press.

CONCLUSION

For the reasons stated herein and previously, certiorari should be granted.

Respectfully submitted,

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